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Prison Overcrowding in Nebraska: The Feasibility of Intensive Supervision Probation

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PRISON OVERCROWDING IN NEBRASKA: THE FEASIBILITY OF INTENSIVE SUPERVISION PROBATION

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This chapter analyzes the magnitude and causes of Nebraska's prison overcrowding problem. Nebraska's response to this problem has been to expand prison capacity and to implement programs to decrease length of stay. Another policy option — reducing prison admissions through intensive supervision probation — is examined in this chapter. Data from Nebraska Parole Board files indicate there is a category of current prison inmates that are not sufficiently dangerous to require imprisonment. Many of these nonviolent offenders with marginal criminal histories could be diverted into intensive probation programs that are more cost-effective than incarceration.

Introduction

Prison populations in the United States are higher than ever before and growing fast. During the 1978-85 period, state prison populations increased from 270,025 to 463,378 inmates. Expenditures by state correctional systems exceeded $8 billion in 1985 (Zedlewski 1987).

At present, inmate populations exceed cell capacities in almost all states. As of February 1986, forty-six states and U.S. territories either were under court order or were involved in litigation concerning prison conditions that could result in court orders (American Civil Liberties Union Foundation 1986). Conditions related to overcrowding are central to a majority of these suits.

Some state prisons, such as New York's Sing Sing Prison, have been the sites of overcrowding-related disturbances in the 1980s (Kurlander 1983). In fact, a frequent argument against overcrowding is that it leads to prison riots.

Nebraska is one of the few lucky states. Even though its prisons are filled beyond capacity, there have been no court orders or inmate riots yet. Correctional policymakers in Nebraska still have the opportunity to take a proactive approach in regulating the prison population before it gets out of control.

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Many strategies for alleviating overcrowding are available to Nebraska policymakers. The traditional response to prison overcrowding has been the construction of additional prison capacity (Blumstein 1983). Other strategies have been devised to regulate the flow of admissions to prison or to control the length of time served. Strategies for controlling prison admissions include revising sentencing law and practice (for example, changing sentencing guidelines), developing alternative sanctions, and using private prisons. Strategies for regulating time served range from efforts to speed up the parole process to attempts to improve classification and expand prerelease programming (Mullen 1987).

Correctional policymakers in Nebraska still have the opportunity to take a proactive approach in regulating the prison population before it gets out of control.

This chapter analyzes the feasibility of Intensive Supervision Probation (ISP) as an alternative sanction. ISP is an intermediate form of punishment that permits certain offenders to serve their prison sentences in the community rather than in prison.

The focus is on ISP for two reasons. First, ISP promises to "get as many people out of prison and off taxpayers' backs as possible" (Conrad 1986, 83). For Nebraska— a state with a limited population base and limited resources — ISP is a potentially useful austerity measure. Second, dependable information is available on the cost-effectiveness of ISP. As yet, knowledge is sketchy and incomplete about other alternatives to prison that have been developed in the 1980s.

This chapter begins with an overview of the Nebraska prison overcrowding situation. Next, Nebraska's short-term prison population is described in order to determine whether Nebraska has a sufficient number of nonviolent offenders who could be placed in ISP without jeopardizing public safety. Following this needs assessment, the cost-effectiveness and political acceptability of ISP are examined. The chapter concludes with a summary of the major findings and a discussion of policy actions that Nebraska policymakers might take.[1]

Prison Overcrowding in Nebraska

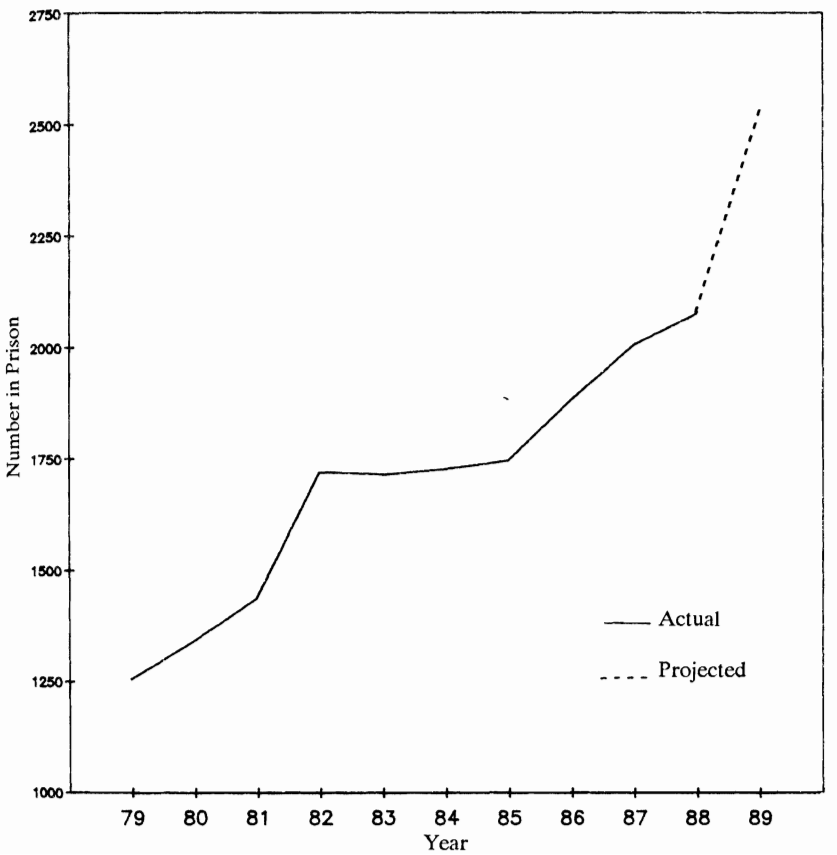
Nebraska's state prisons face an overcrowding problem. Understanding the magnitude of the problem, its causes, and the state correctional agencies'

response to the problem is a necessary prelude to charting a course to solve the problem.

Prison Population Increases

Nebraska's prison population has soared since 1979. In November 1979, there were 1,256 inmates in Nebraska Department of Correctional Services (DCS) penal facilities (DCS 1986a). By June 30, 1988, the state prison population had risen to 2,077 (DCS 1988). This represents nearly a doubling of prison inmates in less than ten years (figure 1).

Figure 1 - Nebraska Prison Population, 1979-89



Several factors are responsible for the increases in Nebraska's prison population.

- Increasing Admissions. From 1980 to 1986 Nebraska experienced a 39.2 percent increase in the number of persons given prison sentences of one or more years (Bureau of Justice Statistics 1987). The 974 total admissions in 1987 represented an all time high for the Nebraska penal system (DCS 1987b).

- Increasing Probability of Imprisonment. Between 1980 and 1985, the ratio of prison commitments to reported crimes in Nebraska increased from 35 to 39 state prison admissions per 1,000 serious offenses (Bureau of Justice Statistics 1987).

- Rising Commitments for Drug Offenses, First Degree Sexual Assault, and Second Degree Forgery. From 1978 to 1987, the percentage of prison commitments for all drug offenses[2] increased from 5.8 percent to 14.6 percent; the percentage of commitments for first degree sexual assault increased from 3.0 percent to 9.3 percent; and the percentage of commitments for second degree forgery increased from 0.8 percent to 5.5 percent (DCS 1987b). Considering the federal government's recent allocation of nearly $1.5 million to criminal justice agencies in Nebraska for the enforcement of state and local drug laws (Nebraska Commission on Law Enforcement and Criminal Justice 1987),[3] commitments for drug offenses can be expected to continue to increase over the next few years.

- Increasing Lengths of Stay in Prison. The median[4] length of stay in Nebraska's prisons has steadily increased from 13 months in 1982 to 15 months in 1983,[5] 19 months in 1984, and 20 months in 1985 and 1986 (DCS 1986a).

- Declining Parole Rates. Between 1969 and 1983, parole rates (the percentage of hearings granted that resulted in paroles) in Nebraska were never lower than seventy percent. From 1984 to 1986, however, the parole rates of 63.98, 58.19, and 63.78 were substantially lower than the[6] parole rates in previous years (Nebraska Parole Board 1969-86).

Based on the assumption that criminal justice policy variables such as these will continue to influence prison population levels, DCS is currently projecting a year-end population of 2,541 inmates by 1989 (DCS 1986a). DCS also acknowledges that the population at the highest risk of imprison

ment (males between the ages of 18 and 39) is expected to remain stable in Nebraska through 1990.[7]

Prison Overcrowding

Nebraska's prison population is increasing, but are its prisons really overcrowded? One way of measuring prison overcrowding is to compare the rated capacity[8] of an institution to its actual population. Table 1 indicates that when rated capacity is used as a yardstick, Nebraska's prisons vary in overcrowdedness. The Nebraska State Penitentiary and the Lincoln Correctional Center are the most crowded DCS facilities. The Nebraska State Penitentiary is 55.3 percent over capacity, while the Lincoln Correctional Center is 44.2 percent over capacity. The Omaha Correctional Center, at 22.1 percent over capacity, and the Nebraska Center for Women, at 10.7 percent over capacity, are much less crowded.

The Nebraska State Penitentiary has seventy percent of the inmates housed in less than sixty square feet per cell; the Lincoln Correctional Center has sixty percent of the inmates living in less than sixty square feet each . . . .

Another way of measuring overcrowding is to examine spatial density. Most standard-setting bodies, such as the American Correctional Association, require sixty square feet of living space for each inmate, which is roughly the size of a bathroom in an American home. To figure the percentage of inmates housed in sixty square feet or less in Nebraska's prisons, the following method was used: (1) DCS data were obtained indicating the average cell size is seventy-five square feet at the Nebraska State Penitentiary, seventy square feet at the Lincoln Correctional Center, and eighty-three square feet at the Omaha Correctional Center (DCS 1987c); (2) it was assumed that every inmate classified as a bed deficit (that is, being without his or her own cell) must share a cell with another inmate who is not classified as a bed deficit; (3) the bed deficit for each facility was multiplied by two to get the number of inmates sharing a space designed for single occupancy; and (4) that number was then divided by the total population of a facility to get the percentage of inmates living in sixty square feet or less.

This method shows that the Nebraska State Penitentiary has seventy percent of its inmates housed in less than sixty square feet per cell; the

Table 1 - Rated Capacities, Current Populations, and Bed Deficits of Nebraska's Prisons on February 17, 1987

Facility	Rated Capacity	Actual Population	Bed Deficit	Percent over Capacity
Nebraska State Penitentiary				
Inside NSP Facility	338	525	187	55.3
Trusty Dormitory	150	154	4	2.7
Lincoln Correctional Center	468	675	205	44.2
Omaha Correctional Center	240	293	53	22.1
Nebraska Center for Women	84	93	9	10.7

Source: Department of Correctional Services.

Lincoln Correctional Center has sixty percent of its inmates living in less than sixty square feet each; and the Omaha Correctional Center has thirty-six percent of its inmates housed in less than sixty square feet each.

Corollaries of Crowding

Nebraska's prison overcrowding-related problems mirror the problems encountered by most states' prisons. First, the number of prisoners inside Nebraska's prisons places severe pressure upon the staff, support services, and financial resources of DCS. While the prison population has risen rapidly, there has not been a concomitant increase in facility staff to manage inmates (DCS 1986a). Generally, resources are becoming insufficient to meet the basic needs of inmates and the prison system (DCS 1986a).

Second, the potential for inmate violence in Nebraska's prisons may be increasing. The most comprehensive research on the linkage between prison overcrowding and inmate violence (Gaes and McGuire 1984)[10] concluded that "overcrowding . . . is the best predictor of assault rates," and that housing large numbers of inmates in dormitories (common areas) is related to higher levels of assault. At the Nebraska State Penitentiary about 150 inmates are housed in a dormitory (table 1), thus heightening the chances for inmate violence there.

Third, overcrowding adversely affects programming. Due to budget cutbacks, programming for inmates has been decreased rather than increased, even though the prison population continues to rise (DCS 1986b). Parole board members blame overcrowding for a shortage of opportunities for inmates to participate in work and rehabilitation programs (Alvarez and

Wieseman 1987). DCS officials blame overcrowding as the cause of increased idleness and overclassification (for example, placing inmates in higher security levels than the inmates' behavior and background require) (Tewes 1987).

Fourth, prisoner litigation relating to crowded conditions is mounting, along with concern among correctional officials about the likelihood of a court order (Gunter 1987a). According to the DCS director, other states faced with similar overcrowding-related problems have been placed under court order (Gunter 1987b). Such litigation imposes costs on the state because these lawsuits require the resources of the state attorney general office as well as the court system.

Nebraska's Response

Nebraska's response to prison overcrowding has been to expand prison capacity and to create programs to reduce length of stay in prison.

Prison Expansion. For the most part, DCS has been trying to *build* its way out of the problem of prison overcrowding. It constructed the Omaha Correctional Center in 1984 to house 240 medium- and minimum-security inmates (DCS 1984-85). It also converted a vacant building on the Hastings Regional Center campus into a 160-bed, minimum-security prison in 1987.

DCS has been trying to build its way out of the problem of prison overcrowding.

Future DCS plans include building a 150-bed, minimum-security area within the compound of the Omaha Correctional Center and constructing a new 150-bed, minimum-security unit near the old reformatory in Lincoln (DCS 1986c). At completion (projected for the summer of 1990), system capacity is expected to be 1,959 male and female beds. Assuming the DCS projection of 2,541 inmates in 1990 is accurate, the population would still be thirty percent over design capacity after construction was finished (DCS 1986a).

The Price of Prison. The price of prison is high. Construction of the Omaha Correctional Center cost over $18 million. Of this amount, $500,000 was paid to acquire a site for the facility in Omaha and $1.5 million was expended to prepare the site for construction (Falconer 1988). The remaining $16 million was used for actual construction costs.

To cover the costs of future prison expansion for 1987-90, DCS made a special request to the Nebraska Legislature in December 1986 for nearly $13 million in additional funding to accommodate estimated prison overpopulation through 1990 (DCS 1986a). Included in this DCS proposal were funds for the construction and operation of three new penal facilities. Initial construction was estimated to cost $562,700 for the Hastings Regional Center, $1,401,800 for the new unit at the Omaha Correctional Center, and $1,973,790 for the new unit at the Lincoln Correctional Center (DCS 1986a).[11] Extra funds were also included to meet the costs resulting from underestimated and unbudgeted increases in the prison population each year.

Building prisons is only part of the cost. Additional costs are paid every year through the operating budget — what it costs to run the prisons. Estimated future annual operating costs are $1,088,781 for the Hastings Regional Center, $755,429 for the new addition at the Omaha Correctional Center, and $1,120,080 for the addition at the Lincoln Correctional Center (DCS 1986a).

Current annual operating costs, including indirect costs such as DCS administrative expenses and per capita costs for Nebraska's prisons, are shown in table 2. A useful way of looking at this expenditure data is to think of the costs of an individual sentence. As table 2 indicates, one year of actual time served at the Nebraska State Penitentiary represents a commitment of $17,045 of the taxpayers' money. In effect, a sentence of one year or ten years says that offender and that crime are worth resources totaling $17,045 or $170,450.

Table 2 - Annual Operating and Per Capita Costs for Nebraska's Prisons, FY 1986-87*

Facility	Annual Operating Cost	Per Capita Cost
Nebraska State Penitentiary	$11,587,349	$17,045
Lincoln Correctional Center and Evaluation Unit	$9,891,289	$14,803
Omaha Correctional Center	$4,088,710	$13,983
Nebraska Center For Women	$1,847,231	$21,331

*Table includes neither the costs of the community corrections centers in Omaha and Lincoln nor the costs of the Hastings Regional Center.

Source: Department of Correctional Services.

Besides operating costs, there are also incalculable — but real — opportunity costs associated with prison expansion. These should be considered as lost opportunity costs, because funds devoted to prisons are unavailable for other public purposes, such as education, health, and economic development.

Return on Investment. What do Nebraskans receive for these large outlays of money? Possible benefits of incarceration include:

- Incapacitation, or the prevention of crimes because the offender is in prison;
- Specific deterrence, or the prevention of crimes because punishment dissuades the punished from repeating crimes;
- Reduced recidivism because inmates are rehabilitated; and
- General deterrence, or prevention of crimes by would-be offenders who are deterred because offenders are punished (Funke 1985).

The few studies that have priced the benefits of incapacitation and reduced recidivism indicate that prisons do not provide enough of these kinds of benefits to justify them by cost alone (Funke 1985). One study, for example, examined the incapacitation benefits of a typical federal correctional institution and concluded that the monetary value of avoided crimes was less than the costs of incarceration (McGuire 1978).

The few studies that have priced the benefits of incapacitation and reduced recidivism indicate that prisons do not provide enough of these kinds of benefits to justify them by cost alone.

Despite the many public discussions and political debates that have concluded with certainty that prisons deter crime and therefore sentences ought to be longer, there is little evidence to support the notion that deterrence is a major benefit of prison. A review of more than twenty analyses directed at testing whether or not the use of noncapital sanctions deters crime cautioned that the evidence "is still not sufficient for providing a rigorous confirmation of the existence of a deterrent effect." (Nagin 1978)

Regarding the incapacitation effects of prison, a distinction must be drawn between schemes involving collective incapacitation and those using

selective incapacitation. Under collective incapacitation, standardized sentences would be developed on the basis of data on rates of recidivism associated with various crimes. Under selective incapacitation, individualized sentences would be given based on predictions about the likelihood that specific offenders would commit serious offenses at a high rate if not locked up. A leading expert on the usefulness of incapacitating criminals reviewed the research findings on incapacitation and concluded that:

> Collective incapacitation policies have only modest impacts on crime but can cause enormous increases in prison populations. Selective incapacitation strategies offer the possibility of achieving greater reductions in crime at considerably smaller costs in prison resources, but their success depends critically on the ability to identify high- rate offenders early in their careers or prospectively. As yet, this has not been accomplished (Cohen 1983,5).

Regarding rehabilitation as a benefit of prison, study after study has shown that rehabilitative programs have promised much but delivered very little in terms of transforming criminals into law-abiding citizens (Bailey 1966; Morris 1974; Lerman 1975; Lipton and others 1975; Riedel and Thornberry 1978). Even if rehabilitation were a proven benefit of prison, this alone would be a weak justification for incarceration, because the prime objective of prisons in the United States is control, not changing the lawbreaker.

More powerful rationales for prisons stem from noneconomic premises that have little to do with either money or recidivism. It is almost certain that there are crimes that can not be priced, such as murder, rape and robbery; and prison can play a useful role in assuring that persons who commit these types of crimes are punished. Also, most people would agree that some offenders are so dangerous they must be locked up, and prison can play an important role in incapacitating these offenders. Additionally, there are persistent criminals who do not respond to probation, parole, or other forms of community corrections, and prison can provide the restrictive controls that these offenders require (Conrad 1985).

If imprisonment in Nebraska were limited to violent, dangerous, and repeat offenders, the state would not have a prison overcrowding problem. But, as the present study will show, there are many nonviolent offenders who are serving time for property crimes in Nebraska's prisons. Some of these offenders could be out of prison under supervision, working and paying taxes, rather than occupying expensive prison cells.

Alternatives to Prison. Reversing the trend toward ever more prisons and prisoners will require a coordinated effort by Nebraska's criminal justice agencies. DCS and the Nebraska Parole Board have begun to chart a course that may keep the state from making a headlong rush into a costly future

They are jointly sponsoring two innovative programs: extended leave and house parole.[12]

Extended Leave. Extended leave allows selected inmates at community corrections centers who have been set for a parole release date to live at home, with their families, for a limited time prior to their scheduled parole releases or discharges from their sentences. Only those inmates who have successfully participated in a work or educational release program, who have a stable residence in the community, and who do not pose a danger to the community, are eligible to apply for extended leave (DCS 1986b).

While inmates are in the community on extended leave, they are under the intensive supervision of Adult Parole Administration field officers (DCS 1986b). Inmates must remain at their homes at all times except while at work, school, or other approved activities. Each inmate has one face-to-face contact per week, either at home or on the job, with a parole officer; two employment contacts per week with a parole officer; and two telephone contacts per week at home with a Community Corrections Center staff person (DCS 1986b).

If imprisonment in Nebraska were limited to violent, dangerous, and repeat offenders, the state would not have a prison overcrowding problem. But there are many nonviolent offenders who are serving time for property crimes in Nebraska's prisons.

Supervising an offender on extended leave costs about the same as supervising a parolee (about $2,133 in 1986-87), and it is cheaper than housing an inmate at the Community Corrections Centers ($7,871 in 1985-86) (Cornwell 1988). Another benefit is that inmates on extended leave have many resources available (for example, mental health and substance abuse counseling, family and marital counseling, educational and vocational training, and so forth) that may not be available in prison due to overcrowding (DCS 1986b).

One hundred two inmates participated in the extended leave program from December 1986 through January 1988. As of February 1, 1988, forty-three of these prisoners had been placed on parole, two had been discharged, three had been removed for technical violations, and the rest (fifty-four) were still on extended leave (Cornwell 1988).

House Parole. House parole is Nebraska's other early release program. House parole is a method of releasing into the community all prisoners who are near the end of their sentences and who have been paroled but do not have employment. The main purpose of house parole is to provide offenders with direct access to employment opportunities.

House parole was begun in January 1986 to remedy a "catch-22" problem (Cornwell 1988): The Nebraska Parole Board refused to parole inmates into the community unless they had jobs, yet many inmates found it difficult to line up jobs while still in prison. As a result, there was a logjam in the parole process, with many parole-eligible inmates remaining in prison because their paroles were pending or they were awaiting employment.

Many inmates with approved residences are placed on house parole in order to find jobs. Parolees on house parole must seek a job from 8:00 a.m. until 5:00 p.m., Monday through Friday. They must be at their approved residences from 5:00 p.m. to 8:00 a.m., Monday through Friday, and all weekend (Nebraska Adult Parole Administration 1986). House parolees who find jobs are placed on regular parole status, while those who fail to find jobs after 30 days may be returned to prison.

Parolees on house parole are under the supervision of parole officers. Each parolee must submit a daily list of the places that will be contacted for employment. The parole officer uses the list to make random checks with prospective employers to ensure that the parolees are where they are supposed to be (Nebraska Adult Parole Administration 1986).

The success of house parole could be measured in terms of how many offenders find jobs, how many offenders commit crimes while in the community, and how much cheaper house parole is than prison. So far, no inmates placed on house parole have committed serious crimes while in the community (Cornwell 1988). It is impossible, however, to make any other statements about the success or failure of house parole because neither the Parole Board nor the Adult Parole Administration keeps statistics on what happens to inmates assigned to the program.

Nebraska's Short-Term Prison Population

Building upon the idea that prison overcrowding can be reduced by offering safe and economical alternatives to incarceration, this section gives a description of the short-term prison population in Nebraska. It addresses the question of whether there is a sufficient number of nonviolent offenders in Nebraska's prisons to justify creating ISP programs in Nebraska. Case files of the Nebraska Parole Board were used to obtain data on the short-term prison population.

Identifying the Most Likely Candidates for ISP

The focus is on those prisoners who have minimum terms of two years or less, because it is assumed that those with shorter sentences have committed less serious crimes and are better risks for release into the community on ISP. There were 688 men and 86 women sentenced to two years or less in Nebraska's prisons from January 1, 1987 through January 1, 1988 (Nebraska Parole Board 1987).

Certain categories of offenders were excluded from consideration as candidates for ISP because of factors in their criminal histories. Offenders admitted to prison in 1987 because of parole violations were excluded because it was doubtful that these offenders would be placed in community alternatives. Offenders who had served prior prison sentences, who had one or more prior felony convictions, or whose current offense was a violent crime, such as murder, sexual assault, or robbery, were excluded for the same reason. Using these exclusionary criteria, there was a remainder of 281 non-violent offenders with zero prior felony convictions, hereafter referred to as NVOZs.

NVOZs do not have to go to prison in Nebraska. All NVOZs are eligible for probation. In theory, it should be easy for many of them to exit the route to prison. Nevertheless, Nebraska's judges sent 281 NVOZs to prison in 1987.

Demographic and Social Characteristics of NVOZs

Table 3 gives social and demographic information on NVOZs sentenced to minimum prison terms of two years or less. Three-fourths were between 17 and 30 years old. About eighty percent of the NVOZs were unmarried, yet over forty percent had children. Approximately three-fourths of the offenders had completed some high school. At the time of the current offense, about one-third of the NVOZs had jobs.

Over seventy percent of the NVOZs had past involvement in drug use and over eighty percent had used alcohol. Data on past successes and failures

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Table 3 - Social and Demographic Characteristics of Nebraska's NVOZs, 1987

Characteristic	Number*	Percent*
Sex		
Male	235	83.6
Female	46	16.4
Race		
White	219	77.9
Minority	62	22.1
Age		
17-21	90	32.0
22-30	129	45.9
31-40	40	14.3
41+	22	7.8
Marital status		
Married	53	18.9
Single	173	61.6
Divorced/separated or widowed	54	19.2
Have children		
Yes	122	43.4
No	159	56.6
Education		
Grade school	16	5.7
Some high school	108	38.4
High school or GED	101	35.9
Some college	55	19.6
Employed at time of arrest		
Yes	98	34.9
No	182	64.8
Known drug use		
Yes	207	73.7
No	74	26.3
Known alcohol use		
Yes	242	86.1
No	39	13.9
Known mental health history		
Yes	48	17.0
No	232	82.6

*Total numbers and percentages may vary among subcategories due to incomplete files.

Source: Nebraska Parole Board.

in drug and alcohol programs and on the drug dependence of individual offenders were not collected. Therefore, the meaning and policy implications of data on drug and alcohol use are unclear.

Current Offenses of NVOZs

Table 4 presents the offenses for which NVOZs were sentenced to prison. Over half of the offenses committed by NVOZs were within the general categories of property and burglary, and over one-fourth of the offenses were in the general category of drugs. Burglary, theft, second-degree forgery, and possession of a controlled substance were the crimes with the highest percentages of NVOZs.

Table 4 - Types and Descriptions of Current Offenses of Nebraska's NVOZs, 1987

	Number	Percent
Property		
Theft	49	17.4
Second degree forgery	28	10.0
Receiving stolen property	10	3.6
Petty larceny	4	1.4
First degree forgery	3	1.1
Bad check $300-$999	3	1.1
Criminal trespassing	3	1.1
Second degree arson	2	.7
Possession of a forged instrument $300+	2	.7
Bad check $1,000+	2	.7
Unlawful sale of mortgaged property	2	.7
Shoplifting third offense	2	.7
Third degree arson	1	.4
Bad check $75-$299	1	.4
Writing a check on nonexistent account	1	.4
Drugs		
Possession of a controlled substance	24	8.5
Delivery of a dangerous substance	20	7.1
Dealing drugs	17	6.0
Manufacturing a controlled substance	4	1.4
Possession of over one pound of marijuana	3	1.1
Burglary	62	22.1

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Table 4 continued - Types and Descriptions of Current Offenses of Nebraska's NVOZs, 1987

	Number	Percent
Other		
Driving under a suspended license	9	3.2
Escape	6	2.1
Accessory to a felony	3	1.1
Aiding in a felony	3	1.1
Resisting arrest	2	.7
Conspiracy	2	.7
Criminal mischief	2	.7
Criminal nonsupport	1	.4
Obstructing police	1	.4
Operating a motor vehicle to avoid arrest	1	.4
False reporting	1	.4
Failure to appear	1	.4
Possession of a concealed weapon	1	.4
Driving while intoxicated third offense	1	.4
Abandoning a dead body	1	.4
Unauthorized operation of a propelled vehicle	1	.4
Possessing a short shotgun	1	.4
Criminal attempt	1	.4
Total	281	100.0

Source: Nebraska Parole Board.

Legal Processing and Sentencing Information on NVOZs

Legal processing and sentencing information on Nebraska's NVOZs is shown in table 5. More than three-fourths of the NVOZs were committed to prison for only one count. Nearly seventy percent had minimum sentences of less than twelve months, while over sixty percent had maximum terms of twenty-four months or less. Also, almost twenty percent of the NVOZs were discharged from prison in the same year that they were sentenced to go there. (It is easy to understand why Nebraska penal authorities refer to NVOZs as "quick dippers.")

Table 5 also indicates that over forty percent of the NVOZs were sentenced from Douglas and Lancaster counties. These figures suggest that there are sufficient numbers of NVOZs in Nebraska's metropolitan areas to justify the creation of ISP programs in Omaha and Lincoln.

Table 5 - Legal Processing and Sentencing Information of Nebraska's NVOZs, 1987

	Number	Percent
Number of counts on current conviction		
1	219	77.9
2	54	19.2
3	6	2.1
4	1	.4
7	1	.4
Minimum sentence		
12 months or under	193	68.3
13-18 months	34	12.1
19-24 months	54	19.2
Maximum sentence		
24 months and under	172	61.2
25-48 months	84	29.9
49-60 months	24	8.5
61-120 months	1	.4
Discharged in 1987		
Yes	54	19.2
No	227	80.8
Number of NVOZs sentenced to prison from Douglas, Lancaster, and all other counties		
Douglas	93	33.1
Lancaster	32	11.4
All other counties	156	55.5

Source: Nebraska Parole Board.

Criminal Histories of NVOZs

Table 6 gives information on the criminal histories of NVOZs. Overall, it appears that NVOZs have limited criminal histories. The following facts stand out:

1. Nearly one-half of the NVOZs had never been previously arrested for a felony and over ninety percent had three or fewer felony arrests.

2. More than seventy percent had no prior arrests for violent crimes.

3. Although sixty percent of the NVOZs had served time in jail, most of these jail terms were for traffic violations.

Table 6 - Criminal Histories of Nebraska's NVOZs, 1987

	Number*	Percent*
Number of prior felony arrests		
0	138	49.1
1	56	19.9
2	40	14.2
3	24	8.5
4	7	2.5
5	4	1.4
6	2	.7
7	4	1.4
8	3	1.1
13	1	.4
15	1	.4
32	1	.4
Number of prior (felony and misdemeanor) arrests for violent crimes		
0	199	70.8
1	41	14.6
2	25	8.9
3	9	3.2
4	3	1.1
5	3	1.1
8	1	.4
Number of prior adult jail terms for crimes and traffic infractions§		
0	111	39.5
1	57	20.3
2	38	13.5
3	23	8.2
4	9	3.2
5	8	2.8
6	8	2.8
7	6	2.1
8+	21	8.3
Number of prior adult probation orders		
0	149	53.0
1	87	31.0
2	29	10.3
3	12	4.3
5	1	.4
6	2	.7
7+	1	.4

- continued

Table 6 continued - Criminal Histories of Nebraska's NVOZs, 1987

	Number*	Percent*
Prior community sanctions (for example, fines and restitution) for crimes and traffic infractions		
Yes	219	77.9
No	50	17.8
Probation at time of offense		
Yes	26	9.3
No	255	90.7
Charges pending at time of arrest		
Yes	47	16.7
No	230	81.9
Warrants or detainers at time of arrest		
Yes	28	10.0
No	229	81.5
Number of prior juvenile commitments		
0	221	78.6
1	34	12.1
2	22	7.8
3	2	.7
4	1	.4

*Total numbers and percentages may vary due to incomplete files.

§ Some NVOZs had multiple jail terms for traffic violations such as failing to have a driver's license, improperly displaying license plates, lacking proof of automobile ownership, running a stop sign, failing to yield, having no headlight, driving on the left side of the road, and driving while intoxicated.

Source: Nebraska Parole Board.

4. Over one-half of the NVOZs had never even been on adult probation, and ninety percent of them were not on probation at the time of arrest.

5. Approximately eighty percent of the offenders had no prior commitments to juvenile correctional institutions.

6. Over eighty percent of the offenders had no pending charges, warrants, or detainers at the time of arrest.

7. Most of the NVOZs (77.9 percent) had prior community sanctions against them, but many of the fines that were included in this category were for traffic violations.

Because of the high cost of imprisonment and its minimal benefits for NVOZs, Nebraska taxpayers may be the ones who suffer when offenders are sentenced to a "quick dip" in prison.

From the information on the criminal histories of NVOZs, it is apparent that many of them could be candidates for ISP. Only a few of the NVOZs (such as the offenders with numerous prior felony arrests in table 6) would not qualify for ISP. Even after excluding the exceptional cases, there would still be a large pool of NVOZs eligible for alternatives to prison.

Benefits and Costs of Short Prison Terms for NVOZs

Most of the NVOZs sentenced to prison in Nebraska are sentenced for retribution or punishment, protection, and deterrence. However, prison sentences for NVOZs may foster criminality rather than deter it, as prisons have been described as "training grounds" for neophyte criminals. Also, community protection is difficult to achieve because it is limited to the brief period that NVOZs are incarcerated.

Punishment is achieved by imprisoning NVOZs, but at what cost? From a fiscal standpoint, imprisoning NVOZs is undesirable. Maintaining the 281 NVOZs sentenced to prison in 1987 costs approximately $4 million per year.[13]

Because of the high cost of imprisonment and its minimal benefits for NVOZs, Nebraska taxpayers may be the ones who suffer when offenders are sentenced to a "quick dip" in prison. The next section examines a reasonably priced alternative to prison for NVOZs that both punishes criminals and protects the community.

ISP: A Viable Alternative for NVOZs in Nebraska

ISPs have been called "prisons without walls" (New Jersey Administrative Office of the Courts 1988). They feature rigorous supervision of offenders, surveillance, curfews, drug testing, mandatory employment and community service, and strict rule enforcement. ISPs may include additional features

such as restitution, fines, house arrest,[14] and electronic monitoring (Burkhardt 1986).

Nebraska policymakers considering using ISP to alleviate prison overcrowding need to consider the following basic questions:

1. How are program participants selected?
2. How are program participants supervised?
3. How well does ISP protect the community?
4. How cost-effective is ISP?
5. How effective is ISP in reducing the prison population?
6. What are the additional benefits of ISP?
7. How politically acceptable is ISP?
8. How practical are supervision fees as a way of funding ISP?

Selection Procedures

The decision to use ISP can be made at different stages in the processing of an offender and by different officials in the justice system. The most noteworthy decision points are at sentencing, at probation and parole revocation proceedings, and at sentence review or resentencing hearings after a prison sentence has been given.

Criteria for program eligibility vary from state to state. All ISP programs try to assess the risks presented by each offender. Sometimes only first-time offenders are eligible; usually violent offenders are disqualified. Probation officers and judges also consider other criteria such as whether the offender has untreatable drug or alcohol problems, an unstable family situation, and/or a poor employment record.

The selection rules in Georgia's Intensive Probation Supervision (IPS) program stipulate that participants be "serious but nonviolent offenders" who, without the intensive supervision option, would have gone to prison in the jurisdiction under which they were sentenced (Erwin 1986a,18). This leads to rejecting high-risk individuals and probation revocation cases.

Georgia's IPS uses two methods for selecting offenders. In one process, offenders who have already been sent to prison are chosen. Inmates are screened for potential assignment to IPS, and recommendations are made to

the sentencing judges to resentence offenders to IPS. In the other method, judges sentence offenders directly to IPS (Erwin 1986a).

The latter route raises questions about whether IPS results in true diversion. Analysis of the offender groups assigned to regular probation, IPS, and prison in Georgia shows that sixty percent of the IPS clients had profiles that were more similar to prison inmates than to probationers (U.S. Bureau of Justice Assistance 1987). This implies that forty percent of the IPS clients were not diverted from prison and that IPS may have been used as an add-on punishment instead of an alternative to prison for some offenders. It also suggests that claims about money saved (IPS is less expensive than prison) may need to be moderated in Georgia's case.

New Jersey's Intensive Supervision Program (ISP) has an inventive way of guaranteeing that its clients are real divertees. In New Jersey, judges cannot sentence an offender directly to ISP. Instead, offenders may apply to the program after they reach prison (Pearson and Bibel 1986). ISP officers screen potential clients. All persons sentenced to a state prison term are eligible unless they are convicted of homicide, robbery, or sex crimes. Offenders also may be excluded for having too many prior offenses or a history of violence. Most of those selected for ISP are burglars, minor thieves, small-time drug sellers, and persons convicted of fraud who have served about four months of their sentence before being released into ISP (Pearson and Bibel 1986).

New Jersey's Intensive Supervision Program (ISP) has an inventive way of guaranteeing that its clients are real divertees . . . judges cannot sentence an offender directly to ISP. Instead, offenders may apply to the program after they reach prison.

After an ISP officer investigates an applicant, an ISP screening board, which is made up of citizen members, reviews the applicant's suitability for ISP and then interviews the applicant to gauge whether there is motivation to succeed in the program. Next, the board either rejects the case or recommends it to the ISP resentencing panel. A six-judge resentencing panel then conducts a hearing to decide whether the applicant will remain in prison or be released into ISP. This panel also reviews the progress of all program participants every ninety days, hears allegations of program violations, and decides whether ISP violators will be returned to prison (New Jersey Administrative Office of the Courts 1988).

While the selection process in New Jersey was set up to ensure diversion of ISP offenders, one side effect was a slow admissions rate to the program. It required almost a year to reach full caseload (Baird 1984, Clear 1986).

Stringency of Supervision

The degree of supervision provided depends on the offender clientele. Periodic checks made by probation officers, in person and by phone, are the most common kind of supervision in ISPs. Some jurisdictions use electronic monitoring.

The Georgia program requires six to twelve months of supervision and has three phases. The first two phases each last three months. In Phase I, there are five contacts with a probation officer per week. This declines to two contacts per week by Phase III. There is a mandatory curfew of 10:00 p.m. to 6:00 a.m. during all these phases.

Each offender must perform 132 hours of community service and either be employed or perform extra community service until a job can be found. Participation in routine, unannounced alcohol and drug testing is also required. In addition, each probationer must pay a $10-50 monthly surveillance fee (Erwin 1987).

A team method of supervision is used, with one probation officer and one surveillance officer assigned to 25 probationers, or one probation officer and two surveillance officers assigned to 40 probationers. Each offender must follow behavioral standards, and submit to surveillance adequate to minimize risk to the community and allow for rehabilitative counseling.

In New Jersey, each offender selected for ISP receives twenty face-to-face contacts per month during the first fourteen months of an eighteen-month program. Some offenders are checked frequently for curfew violations by electronic monitoring, and over eighty percent of the participants are screened periodically for drugs (Pearson 1985).

New Jersey requires each offender to find employment within thirty days of release from the program and to perform sixteen hours of community service per month. Some offenders pay fines or make restitution, and some receive counseling and treatment for behavioral problems such as drug abuse (Pearson 1985).

Caseloads in the New Jersey program are about twenty participants per officer. Officers spend eighty percent of their time directing field supervision. Most of this time is spent seeing offenders at their homes, jobs, treatment programs, and community service sites. Officers work flexible hours because evenings and weekends are prime supervision times. They work out of their residences and go to regional offices only for paperwork and staff meetings (New Jersey Administrative Office of the Courts 1988).

Community Protection

Georgia's IPS Program. How well does intensive supervision control offenders? Georgia reports that of the 2,322 people in its program between 1982 and 1985, 370 (sixteen percent) absconded or had their probation revoked (Erwin and Bennett 1987). The remaining 1,952 were diverted successfully from prison. Only 0.8 percent of IPS probationers were convicted of any violent personal crimes while under IPS. Most of the IPS clients' new crimes were violations of drug and alcohol laws, and none resulted in serious bodily injury to a victim (Erwin and Bennett 1987).

A comparison of results for 200 IPS probationers, 200 regular probationers, and 97 prison releases after an eighteen-month period, showed that IPS probationers had lower reconviction rates (18.5 percent) than either regular probationers (24.0 percent) or prison releases (42.3 percent) (Erwin and Bennett 1987). In addition, the IPS group was convicted of fewer serious new crimes against persons than either of the other two groups. Although more IPS probationers violated the conditions of probation than did regular probationers (7 percent compared to 4.5 percent), and more IPS probationers were re-arrested than regular probationers (40.0 percent compared to 35.5 percent), this might be expected because ISP probationers were so closely supervised that any illegal actions would be extremely difficult to hide. It was not expected that only 1 of the sample of 200 IPS probationers would abscond, compared to 4 of the 200 regular probationers (Erwin and Bennett 1987).

Drug offenders were the most successful in the IPS program. They had a ninety percent success rate during the eighteen-month follow-up study period. Random urinalysis, monitoring, frequent contact, and curfews during the evening and on weekends may be especially effective in controlling drug offenders (Erwin and Bennett 1987).

New Jersey's ISP Program. New Jersey's program reports that of 1,147 offenders assigned to ISP from 1983 to August 1987, 400 (thirty-five percent) are still in ISP, 394 (thirty-four percent) have successfully completed the program, 342 (thirty percent) have been returned to prison, and 11 (one percent) have either died or had their prison sentences overturned. Among the 342 who were returned to prison, 249 were returned for violating program rules and 93 for committing new crimes. The high percentage of participants returning to prison is the result of frequent drug monitoring and curfew checks (New Jersey Administrative Office of the Courts 1988).

Recidivism among New Jersey's ISP graduates has been low. Since 1984, 327 participants have successfully completed ISP. According to New Jersey State Police criminal history records, only fourteen (four percent) of ISP graduates since 1984 have been convicted of new offenses. Nine of the

fourteen graduates were convicted of disorderly persons offenses such as shoplifting. None of the offenses involved violence (New Jersey Administrative Office of the Courts 1988).

The findings from New Jersey are ambiguous. On one hand, ISP offenders and prison offenders were significantly different in terms of prior felony convictions, with the ISP group having an average of 2.2 prior felony convictions compared with an average of 5.1 for inmates in New Jersey's prisons. Also, ISP participants were more likely to have jobs at the time of the current offense and were better educated than prison inmates (Pearson and Bibel 1986). On the other hand, ISP participants during the study period were real felons — two-thirds of them had prior felony convictions (Pearson and Bibel 1986).

In Georgia, IPS cost nearly $7,000 less than prison, per offender, each year.... In New Jersey in 1987, the annual cost per ISP participant was $5,208, compared to $22,000 for prison.

The main policy implication of the findings on community protection from both Georgia and New Jersey is this: If certain kinds of offenders are placed under intensive supervision, there is a limited risk to the community.

Cost-Effectiveness of ISP

One of the appeals of ISP is its relatively low price compared to prison. Policymakers must decide whether the money that could be saved through intensive probation justifies its risks and benefits.

In Georgia, IPS costs nearly $7,000 less than prison, per offender, each year (excluding what might otherwise have been spent on building new prisons). If all 2,322 offenders placed in IPS from 1982-85 were diverted from prison, more than $13 million was saved (Erwin and Bennett 1987). One reason for such a large savings is that Georgia's IPS probationers pay supervision fees.

In New Jersey in 1987, the annual cost per ISP participant was $5,208, compared to $22,000 for prison. Program costs were further offset because ISP participants paid federal and state taxes, fines, child support, restitution, and supervision fees, and contributed free community service. When these monetary benefits of ISP are considered, the net cost of ISP is less than

$2,000 per year for each participant (New Jersey Administrative Office o the Courts 1988).

On the national level, the Rand Corporation (Petersilia 1986) used information from its nationwide survey of innovations in probation to calculate estimates of annual costs per offender of intensive probation and other alternative sentences. Table 7 indicates that intensive probation is much cheaper than incarceration in jail or prison. Home detention costs nearly the same as intensive probation, depending on whether electronic monitoring is used as part of home detention.

Table 7 - Comparisons of the Costs of Alternative Sentences

Type of Program	Annual Cost Per Offender
Routine probation	$300-$2,000
Intensive probation	$2,000-$7,000
Home detention*	$2,000-$8,500
Local jail	$8,000-$12,000
State prison	$9,000-$20,000

*Costs of the home detention program depend on whether electronic monitoring is used.

Source: Rand Corporation.

Prison Population Reduction

The cost savings promised by intensive probation depend on whether it actually diverts offenders from prison. Georgia's success in reducing its prison population through IPS predicts what could happen if Nebraska were to adopt Georgia's model.

Before establishing IPS in 1982, Georgia had the highest incarceration rate in the United States. Georgia's elected judges gave harsh sentences and sent to prison many felons who would not have gone to prison in other states (Otten 1987). So Georgia's offenders may be unusually low-risk by national standards. As the analysis of Nebraska's prison population has shown, Nebraska also has many low-risk offenders who could be eligible for intensive probation.

Evidence from Georgia, which implemented IPS in 1982, indicates that following the introduction of IPS (from 1982 through 1985) there was a ten percent reduction in felons sentenced to prison. During the same period, the percentage of offenders placed on probation increased ten percent — from sixty-three percent in 1982 to seventy-three percent in 1985 (Erwin and Bennett 1987).

Additional Benefits

In Georgia, IPS probationers produced thousands of hours of public service, such as working at maintenance and other jobs in hospitals, parks, day care centers, and charity programs. Even if these hours are valued at minimum wage, the contribution to society is large (Erwin and Bennett 1987).

Other benefits can be achieved through intensive probation. For example, offenders who are placed on intensive probation instead of being sent to prison do not lose their jobs, and their families are not forced to receive welfare support. Also, offenders on intensive probation can pay taxes and make restitution while avoiding the criminal influences of prison.

Offenders who are placed on intensive probation instead of being sent to prison do not lose their jobs, and their families are not forced to receive welfare support.

Political Acceptability

The results of a recent survey of Nebraska's correctional policymakers show the political feasibility of ISP in Nebraska (Hoffman and Webb 1987). The survey gauged how receptive the persons who are instrumental in making correctional policy in Nebraska are to various solutions to the overcrowding problem.

Personal interviews were conducted with selected legislators, correctional administrators, judges, prosecutors, police administrators, and other criminal justice officials who form correctional policy in Nebraska. These policymakers were asked to indicate their approval or disapproval of different solutions to the prison overcrowding problem.

A major finding of this survey was that there is strong support among Nebraska policymakers for intensive probation. Eighteen of the 25 policymakers interviewed said they approve of intensive probation for first-time, nonviolent offenders. Two of the policymakers were neutral to intensive probation, four were opposed, and one was undecided.

Policymakers also were asked whether it would be feasible to implement intensive probation in Nebraska. All of them said it would be politically as well as economically feasible, as long as taxes were not increased.

Supervision Fees as a Funding Source

Supervision fees are a potential source of funding ISP in Nebraska. The National Institute of Corrections (NIC) reports that twenty-three states are charging supervision fees to probationers and parolees (NIC 1983). Probation fees partially support Georgia's highly successful IPS (Erwin and Bennett 1987).

Three types of services for which fees are being charged in other states are: (1) room and board in transitional residential programs (for example, restitution centers and halfway houses); (2) fees for specific services (for example, substance abuse counseling); and (3) fees for correctional supervision (NIC 1983).

The usual method of collecting supervision fees is to charge a uniform monthly rate, usually $10 or $15 (NIC 1983). Other methods include a fee for a specified period of supervision (for example, $100 for six months); monthly rates set within an allowable range (for example, $10-$50); discretionary rates based on an offender's ability to pay and the costs of probation services; and a combined flat rate and monthly fee, which requires the offender to make an initial probation user payment and then pay a monthly fee (NIC 1983).

To avoid discrimination against poor offenders, supervision fee programs allow a waiver or reduction of payments in some situations. States waive or reduce supervision fees for offenders who are physically or mentally incapable of working, whose income falls below the poverty level, and who have a large number of dependents to provide for (NIC 1983).

Proponents of supervision fees say that the programs provide substantial revenue. In the Georgia IPS program, for example, fee collections through the first four years of IPS exceeded total IPS costs (Erwin 1986). This does not mean that IPS probationers alone have supported the program. IPS was initially a pilot program in thirteen of Georgia's forty-five judicial districts and was supported partially by fees collected statewide from regular probationers (Erwin 1986).

Two important questions associated with fee programs are: Who should receive the revenue? and, How should it be spent? Probation and parole agencies argue that they are entitled to the money because they use their resources to collect it. In Georgia, for example, funds are used to support IPS and other innovations in probation. However, in nine of the 23 states that collect fees, revenues are returned to the state's general fund, where the money does not have to be spent on corrections (NIC 1983).

Opponents of supervision claim that fee programs do not generate much revenue, place unfair burdens on offenders who already have enough financial responsibilities, encourage inequities in the justice system, and risk legal

challenges (NIC 1983). NIC data on fee programs in 23 states, however, establish the following facts about these programs:

- Substantial amounts of money can be raised from supervision fee programs.
- Moderate fees can be collected from a majority of the probation/parole populations.
- Guidelines can be established to assure equitable enforcement of supervision fee payments.
- No significant legal challenges have succeeded in curtailing the practice of collecting supervision fees (NIC 1983).

National opinion polls indicate that the public wants criminals punished, but that it is unwilling to pay for more prisons. Polls also indicate that the public is supportive of nonprison forms of punishment.

The policy implication for Nebraska regarding NIC's findings is that supervision fees would be a practical way of generating revenue to support intensive probation. Furthermore, using supervision fees to defray program costs might make it easier to market ISP to Nebraskans. Money for initiating IPS, however, would have to come from another source.

Summary and Suggested Policy Actions

Editor's note: The Nebraska Probation Administration began planning a pilot intensive probation program in the summer of 1988 (Keller 1988). No details of the program were available at the time of this writing.

Prison overcrowding will remain a serious problem in Nebraska in the near future. Increases in prison admissions and in lengths of stay are the main factors adding to Nebraska's prison population. Nebraska's answer to the problem has been to expand prison capacity and to implement programs to reduce length of stay.

This strategy of increasing prison capacity is premised on the perception that the public wants harsh forms of punishment. Indeed, national opinion polls indicate that the public wants criminals punished, but that it is unwilling to pay for more prisons. Polls also indicate that the public is supportive of nonprison forms of punishment.

Nebraska policymakers should give serious consideration to policy options featuring nonprison forms of punishment. Data from the Nebraska Parole Board's files show that there currently are many prison inmates who are not dangerous enough to require imprisonment. Many of these nonviolent offenders with marginal criminal histories could be diverted into intensive probation programs that are more cost-effective than incarceration.

Nebraska should develop pilot intensive supervision programs in Omaha and Lincoln with the goal of reducing prison admissions by 50 to 100 commitments per year. If the goal of the pilot programs is to provide a cost-effective alternative to prison, safeguards should be established to ensure that diversion takes place. The selection of inappropriate offenders for ISP (for example, those who do not require additional control and who would not ordinarily be sent to prison) wastes program space and causes an increase in correctional costs (Mathias 1986).

Nebraska should develop pilot intensive supervision programs in Omaha and Lincoln with the goal of reducing prison admissions by 50 to 100 commitments per year.

Carefully designed procedures for monitoring the implementation of selection methods are the best precautionary measures. Because of the tendency of some Nebraska judges to sentence NVOZs to prison, it is unlikely that a large enough part of the target population could be diverted through a selection method like Georgia's, which makes intensive probation a judicial sentencing option. A more effective method would be one like New Jersey's, which considers only offenders who have already received a prison sentence. One drawback, however, is that this method is slow in admitting offenders into programs.

Successful implementation of ISP pilot programs in Nebraska will require that the public's demand for punishment be satisfied. Policymakers should tailor pilot programs to serve as punishment as well as diversion. New Jersey runs the most punitive program, selecting offenders only after they have been imprisoned. New Jersey's approach combines elements of probation and incarceration.

Nebraska policymakers may want to consider requiring offenders to spend a brief period, such as 30 days, in prison before selection for ISP. Such an approach has the advantages of providing more protection to the community and of possibly shocking offenders into a realization that they must end their criminal involvement. Disadvantages are that adding a shock

feature to ISP increases the costs of the program (because a short time in prison costs more than a short time in IPS) and subjects ISP clients to the potentially negative influences of prison.

The punitive benefits of intensive probation can also be increased by including multiple requirements. Programs in New Jersey and Georgia, for example, require offenders to perform community service without pay, to pay fines and supervision fees, to submit to frequent drug testing, to engage in full-time work, to abide by curfews, to participate in counseling, and to make restitution to victims.

ISP is a proven, cost-effective approach for alleviating prison overcrowding.

The issue of punitiveness of the pilot programs has public relations dimensions. Developers of ISP programs in Nebraska should be concerned with gaining public support for the placement of ISP offenders in the community. One strategy that has worked in other states is to form an ISP advisory group including citizens, the media, and representatives of criminal justice agencies (Bureau of Justice Assistance 1987).

Beyond these issues in program development and implementation, Nebraska policymakers need to realize that ISP is a realistic policy choice. ISP is a proven, cost-effective approach for alleviating prison overcrowding; it has the potential for meeting the public's demand for punishment; and equally important, it is economically and politically feasible.

Endnotes

1. This study is modeled after the prison diversion studies conducted in Michigan (Bynum, Morash, Davidson, and Basta 1987) and New York (Mathias 1986).

2. Drug offenses include the crimes of administering narcotics to addicts, dealing in narcotics or controlled substances, possessing a controlled substance except marijuana, possessing more than one pound of marijuana, delivering or distributing a dangerous substance, and (for registered persons) intentionally violating drug laws.

3. This money was made available through the Anti-Drug Abuse Act of 1986.

4. The mean or average is not as useful as the median for examining length of stay over time because extreme values affect the mean. The median is simply the middle number in a distribution.

5. DCS data indicate that longer sentences have not been a major factor contributing to increases in length of stay. The median minimum sentence actually decreased from 18 months in 1978 to 14 months in 1986, while the median maximum sentence was 36 months for every year from 1978 to 1986 (DCS 1986d).

6. To speed the parole process, the Nebraska Parole Board recently advanced parole hearing schedules in order to permit the early identification and release of parole-eligible inmates. This allows more time to develop approved living and work arrangements, assuring that fewer paroles are delayed beyond eligible release dates. The parole board also increased the frequency of parole hearings to clear backlogs of "quick dippers," or prisoners who are sentenced to one year or less for committing Class I misdemeanors (Bartee 1988). As a result of these and other efforts, the number of adult parolees in Nebraska jumped from 283 in February of 1987 to 420 in February of 1988 (DCS 1988).

7. Although the number of males in Nebraska who are between the ages of eighteen and thirty-nine peaked at 291,695 in 1985, the projection of males between these ages for 1990 is 289,144, which is not a very significant decrease (DCS 1986e).

8. The rated capacities of the Nebraska State Penitentiary and the Lincoln Correctional Center are 150 percent of their design capacities. (Design capacity is the number of inmates that planners or architects intended for a facility.) DCS administrators have determined the rated capacities of Nebraska's other prisons in terms of design, population and staffing (DCS 1986a).

9. Data on the average square feet per cell at the Nebraska Center for Women were unavailable.

10. Gaes and McGuire (1984) used longitudinal data, multiple institutions, and multiple measures of overcrowding, and also controlled for inmate characteristics (for example, age and prior record) and inmate prison activities (for example, education and work assignment).

11. The Nebraska Legislature approved part of the DCS request and provided money for the renovation of the Hastings facility, which opened in 1987. DCS plans to resubmit its proposal for funds to build the other two proposed correctional facilities (Falconer 1988).

12. DCS also uses prerelease, work release, and furloughs to relieve pressure on the prisons from overpopulation.

13. This estimate was derived by multiplying the per capita cost of housing an inmate at the Omaha Correctional Center ($13,983) by the number of male NVOZs sentenced to prison in 1987 (N = 235), by multiplying the per capita cost of housing an inmate at the Nebraska Center for Women ($21,331) by the number of female NVOZs sentenced to prison in 1987 (N = 46), and by summing the totals. This method may slightly overestimate costs because it counts the 54 offenders who were admitted and discharged in 1987 as staying in prison all year, and some offenders may be placed in community corrections centers (which are cheaper than prisons) before the end of their first year in prison. This overcounting, however, would be partially counterbalanced by the male NVOZs who are sent to the Nebraska State Penitentiary, where the per capita cost is $17,045, instead of the Omaha Correctional Center.

14. House arrest programs restrict offenders' free-time activities in order to reduce their opportunities to commit crimes. The least restrictive form of house arrest involves curfews; the most restrictive form uses a computer and an electronic monitoring device to monitor compliance with program requirements. House arrest may be part of ISP, or it may exist apart from ISP, as is the case with Nebraska's house parole program.

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appropriations would have been required to have a net positive impact on Nebraska before the export permit could be issued.

- Explicitly limited surface water interbasin transfers, groundwater municipal transfers, and groundwater industrial transfers to instate transfers, thus requiring anyone wishing to export water under these statutes to obtain an export permit.

LB 151, the second bill introduced during 1987, was similar to LB 146 in:

- Authorizing a water exports and transfers study;
- Making surface water rights freely transferable; and
- Restricting surface water exports, interbasin transfers, groundwater municipal transfers, and groundwater industrial transfers to instate transfers only.

However, LB 151 went further than LB 146 in giving the Water Management Board responsibility for promoting water exports. LB 151 would have authorized the board to find buyers for Nebraska's water, construct water export projects, and use the profits from export water sales to construct new water projects in Nebraska. LB 151 also authorized instate groundwater transfers for any purpose, greatly expanding instate groundwater transfer authorities. However, the quantity of groundwater that could be transferred could not exceed current withdrawals from an existing well or net annual recharge for withdrawals from new wells, both of which would have severely limited groundwater transfers. Finally, half of the proceeds received by Nebraska landowners from private groundwater exports would be paid to the state to help construct water projects.

Water Export Policy Assumptions. LB 146 and LB 151 were based on two premises: That *Sporhase* requires states to treat instate water uses and exports exactly the same, and that Nebraska, having abundant groundwater supplies, should sell some of its surplus water to further water resource development within the state. While neither premise is unreasonable, they both can be challenged. First, *Sporhase* allows states to establish a limited preference for instate water uses, although the limits of that preference have yet to be defined. This contradicts the notion that whatever applies to exports must apply equally to instate uses. Thus, the challenge is not simply to come up with instate policies that will accomplish water export policy objectives — although that is a critical part of any water export strategy. The challenge is to test the *Sporhase* decision by creatively defining in statutes and administrative practice a limited instate preference that protects important local values and purposes — economic and noneconomic alike — that do not impermissibly intrude upon interstate commerce. While this is no easy

task, it is a choice which should not be simply dismissed, as it was in LB 146 and LB 151.

The second premise, that Nebraska has surplus water which should be sold to facilitate water resource development, is even more controversial. The definition of surplus is subjective and depends entirely upon the values one wishes to protect. For example, if one wishes to protect wet meadows in the Sandhills or to maintain streamflows in the Loup River system, there is little surplus groundwater in Nebraska. If, however, providing clean drinking water to residents of the Southwest is considered first, the protection of the wet meadows in the Sandhills to maintain a ranching economy and way of life has lower political priority, and there is surplus water in Nebraska.

LB 146 and LB 151 were based on two premises: That Sporhase *requires states to treat instate water uses and exports exactly the same, and that Nebraska, having abundant groundwater supplies, should sell some of its surplus water to further water resource development within the state. While neither premise is unreasonable, they both can be challenged.*

Even assuming that, for the sake of argument, there is surplus water available in Nebraska, selling it to construct water resource projects to increase or maintain irrigation is questionable. Since World War II, one of the major farm policy issues has been coping with grain surpluses. While there have been brief periods of low grain stocks and high world grain prices, the last three decades have been characterized by surplus grain. This has led to federal programs to pay farmers not to plant grain, which has been an important factor in reduced federal spending for water projects: it does not pay to increase irrigation of surplus crops, especially when the producers of those crops are then entitled to federal crop subsidies. The double-subsidy aspect of federal water projects — using irrigation water subsidized by federal taxpayers to grow surplus crops for which the taxpayers must pay again — has helped critics of the federal reclamation program curtail program funding.

To suggest, then, that Nebraska should sell its water so that it can build water projects to produce additional crop surpluses ignores economic reality. Improved production techniques in South America and Asia have allowed other countries to produce grain at least as cheaply as it can be produced in

Nebraska. And biotechnology holds the further promise of increased yields without irrigation. Thus, a policy based on selling water to increase surplus crop production is short sighted and may lead to the economic demise of those it seeks to help.

If Nebraska decides to export its water for money, developing new irrigation projects is not the only potential use of this new state revenue and is clearly not the most desirable use.

The use of state proceeds from water exports is an important decision which deserves wide debate. Groundwater quality protection, soil conservation, and instream flows protection are simply a beginning in terms of important natural resources programs that deserve increased state funding. Other alternative uses of state revenues from water exports are: education, economic development, and transportation improvements. The point is that if Nebraska decides to export its water for money, developing new irrigation projects is not the only potential use of this new state revenue and is clearly not the most desirable use.

In summary, LB 146 and LB 151 are based on the mistaken premise that water exports and water right exports are inevitable and therefore the state should attempt to take financial advantage of the situation. While Nebraska does need to evaluate policy options carefully relative to *Sporhase*, it must evaluate all possible options, not simply those that lend themselves to increased water development.

Political Response. Both LB 146 and LB 151 contain several controversial and emotionally charged issues: that the state should aggressively sell its water, that water rights should be freely transferable, and that interbasin groundwater transfers should be authorized. Each issue alone would generate significant political controversy; the combination of all three issues in any single bill would make it politically impossible to enact. This was borne out in the public hearings on LB 146 and LB 151.

The hearings demonstrated that people generally did not comprehend all aspects of the proposed bills, and in any event there was little political support for enacting the bills into law. Interested groups, including the Nebraska Farm Bureau, the Nebraska Farmers Union and the Nebraska Sierra Club, generally voiced support for only the study provisions of LB 146 and opposed the more aggressive water export promotion of LB 151. After

the hearings, the Natural Resources Committee approved only the water export study provisions and removed all other provisions from LB 146. Provisions removing the requirement for legislative approval for surface water exports were added to LB 146 by amendment and the bill was enacted into law.

Studying Water Exports and Transfers in Nebraska

As finally enacted, LB 146 recited legislative findings that surface water and groundwater were being transferred from the land where they occurred to users within and outside of Nebraska, and that such transfers were likely to increase as water shortages occurred within and outside of Nebraska. The legislature also found that Nebraska enjoyed generally abundant water supplies and a chronic overabundance in some areas. Finally, the legislature declared that state government should provide an orderly mechanism for transferring water from areas of surplus to areas of shortage, to provide for compensating individual landowners and the public for such transfers, and to balance the rights of individual landowners and the public against the free market forces that compel the use of water where it brings the greatest economic return.

LB 146 then directed the Water Management Board to prepare a study which would:

- Analyze current legal, statutory, physical, social, environmental and economic impediments to surface and groundwater transfers;
- Develop a statutory framework to permit water transfers while protecting the environment and the rights of landowners and the public;
- Develop a statutory framework to compensate those harmed by water transfers and also the state of Nebraska on behalf of the general public;
- Identify potential users and markets for water exports, transfers, and water right sales;
- Identify economically feasible water transfer and export opportunities; and
- Identify an appropriate state role in facilitating and regulating water right transfers and exports.

The report was presented to the legislature and governor November 30, 1988. A draft report was made available July 15, 1988, and the public comment period ended August 30, 1988.

The final version of LB 146 as adopted by the Unicameral contained the same limiting assumptions that were in its original version: that water

The LB 146 study does not evaluate the entire range of legal and political options available to respond to the Sporhase *decision, but rather only a subset of those options which are favorable to water development.*

exports and transfers are inevitable and Nebraska should try to take advantage of the situation. The LB 146-mandated study was not required to include either an evaluation of *Sporhase* or a definition of the legal limits of the *Sporhase* decision, and in fact makes the same simplifying assumption. Thus the LB 146 study was not intended to evaluate the entire range of legal and political options available to respond to the *Sporhase* decision, but rather only a subset of those options favorable to water development.

Despite the limitations imposed by the legislature, the Water Management Board study provides a careful analysis of potential water transfers and exports and their impacts on Nebraska. The July 15, 1988, draft report included five proposed bills to meet the requirements of LB 146. The topics addressed by the five proposed bills are as follows (see table 1 for a comparison of these bills with current water laws, and with additional policy options discussed in the concluding section of the chapter):

- Water transfer regulations,
- Rights to saved water,
- Water use fees,
- State water transfer promotion, and
- State water transfer projects.

Each bill, if introduced, will be highly controversial.

Water Transfers Regulation

If enacted, the first draft bill would represent a major departure from past water legislation in Nebraska. The bill would authorize water rights transfers and establish uniform rules for both surface and groundwater exports and instate transfers. The bill would define for the first time in Nebraska what constitutes a transfer of groundwater and would require permits for groundwater transfers away from the section within which the well is located. However, permits would not be required for groundwater used solely for domestic (household, not including livestock watering) purposes or for the

Table 1 - Effect of Water Management Board-Proposed Bills on Nebraska's Water Policies

	Surface Water Right Sales	Water Exports	Instate Interbasin Groundwater Transfers	Instate Interbasin Surface Water Transfers
Current Policy	Can be sold for same purpose within same river basin.	Surface water and groundwater can be exported with DWR permit, permits may be denied in public interest.	Allowed for municipal and industrial purposes only with DWR permit.	Allow for any purpose with DWR permit if state benefits outweigh state environmental and economic costs.
WMB Proposal	Could be sold for different purposes in different river basins and across state lines.	Same plus new environmental impact statement and mitigation/compensation required.	Allow agricultural groundwater transfers (as well as municipal, industrial transfers) on same basis as water exports.	Make surface water transfers subject to same requirements as exports (public interest, environmental impact statement).
Other Alternatives	a. Limit purposes for which water rights can be purchased to instream flows protection. b. Limit purposes for which water rights can be purchased to water exchanges.	a. Do nothing. b. Discourage exports by better defining public interest factors to protect Nebraska water uses. c. Discourage ground water exports by regulating groundwater use to reduce or prevent groundwater depletion. d. Discourage surface water exports by establishing minimum stream flow requirements. e. Give state greater control over exports through state water leasing. f. Explore *Sporhase* instate water use preference.	Make transfers subject to strict groundwater use regulations to prevent or limit depletion.	Make transfers subject to instream flow requirements.

irrigation of up to 160 acres of an adjacent section. The new requirements would apply to virtually all surface water appropriation applications except instream flow applications, and to all nonexempt groundwater transfers off the section where the well is located. Thus, groundwater transfers for agricultural purposes would be authorized for the first time in Nebraska.

A permit would be required from the DWR for groundwater and surface-water transfers and exports, and surface water rights sales. The applicant would be required to prepare a full impact analysis of the proposed transfer, export, or water rights sale. The required impact analysis, which is modeled after federal environmental impact statement requirements, would include:

- The social, economic, physical, and environmental effects of the proposed action;
- Any unavoidable adverse impacts;
- Alternatives to the proposed action;
- The relationship between short-term uses of the environment and the maintenance and enhancement of long-term productivity;
- Any irreversible and irretrievable resource commitments; and
- Alternatives and recommendations when the proposed action involves unresolved conflicts regarding alternative resource uses.

Transfers, exports, or water rights sales involving small quantities of water, or obviously having no adverse impacts, would be administratively exempted from the impact statement requirement. The impact statement requirement would provide environmental protection requirements not available in water rights proceedings, an important innovation.

The DWR director would first determine, in consultation with appropriate state agencies, whether any of the adverse effects identified in the impact statement could be avoided through compensation or mitigation. For example, if a proposed groundwater transfer or export would lower the water levels in nearby wells, that adverse impact could be mitigated by agreeing to pay the costs of installing deeper wells. The same adverse impact could be avoided through compensating those landowners whose wells would be harmed by the groundwater transfer or export by paying for the replacement of their wells. Similarly, if a surface water diversion would interfere with wildlife habitat, that adverse impact could be mitigated by agreeing to minimum flow requirements to maintain habitat during critical periods, or by providing substitute water or habitat. If the DWR director determined that such compensation or mitigation was appropriate, the director would be required to specify such measures as a condition to granting the permit.

After the DWR director had considered how to handle adverse impacts, the proposed transfer permit, export permit, or water rights transfer permit would be required to be approved:

- If the applicant agreed to all conditions imposed by the director;
- If the director determined that the benefits of the proposed use or transfer would clearly outweigh any adverse impacts which could be avoided, compensated or mitigated; and
- If the proposed action was consistent with all other applicable laws, such as the Nebraska endangered species act.

If any one of these three requirements was not met, the permit would be required to be denied in the public interest.

In determining whether the benefits of the proposed water transfer or use clearly outweighed any unavoidable, uncompensable, and unmitigated adverse impacts, the director's considerations would be required to include:

- The economic, environmental and other benefits of the proposed use or transfer;
- The nature and extent of remaining adverse social, economic, physical and environmental impacts of the proposed transfer or use;
- Opportunities for future water uses foregone if the proposed transfer or use were permitted;
- Alternative actions and water sources available to the applicant; and
- Any other factors the director deemed relevant to the public interest and to the health and safety of Nebraska's citizens.

Any permits granted would be conditional on payment of the first annual permit fee for the water used or transferred. Permits could be granted for up to fifty years, although a permit may be renewed following the same procedures as for the original application. Groundwater transfers and exports would be limited to no more than 60,000 acre-feet annually — the amount of the largest groundwater transfer (from the Platte River to Omaha) currently occurring in Nebraska. The quantity of water that could be sold with a transfer of surface water appropriations would be the amount of water historically consumed, not the entire amount of water diverted. This would protect the return flows for downstream users.

The proposed bill is a thoughtful implementation of a comprehensive water transfer policy. The impact statement requirement establishes a potential for substantial environmental protection in water rights proceedings not available under current law. This is a significant innovation, although the effectiveness of this protection depends entirely upon how such a policy

would be implemented by the DWR director. Perhaps more importantly, the bill gives the DWR director implicit authority to tip the scales in favor of instate uses through the wildcard public interest criterion. Thus, although the LB 146 study did not explicitly explore the possibility of favoring instate water uses beyond pubic health and safety requirements in water export proceedings, the proposed water transfer bill is broad enough to give the DWR director sufficient discretion to make that distinction. The bill also shows potential exporters how to avoid that public interest determination through compensation and mitigation of adverse impacts.

The impact statement requirement establishes a potential for substantial environmental protection in water rights proceedings not available under current law.

While the proposed bill gives the DWR director discretion to establish substantial environmental protection conditions and conditions to protect local water users, the effectiveness of this approach depends entirely upon how the director would implement this authority. Recent DWR administrative decisions suggest that the director might be more protective of water development objectives than of environmental protection. In issuing water rights for a proposed Platte River irrigation project, the DWR director dismissed a finding by the Nebraska Game and Parks Commission that the project would harm endangered wildlife species and concluded instead that the project could not harm wildlife (Pearson and Aiken 1987). Presumably the DWR director's attitudes toward water development and environmental protection might change if the circumstances pitted export water uses against protection of Nebraska environmental resources.

A related issue is groundwater depletion. While the DWR director would have authority to implement a no-depletion policy, the director's discretion would also allow a depletion policy to be implemented if compensation or mitigation were provided. Natural resource districts, however, would be authorized to establish more restrictive groundwater allocation policies within groundwater control areas, and these stricter policies would apply to exporters. Thus, if an NRD wanted to limit groundwater withdrawals for local use and export use to no more than average annual recharge, groundwater depletion from water exports could be avoided. However, an area with abundant groundwater supplies might have difficulty persuading the DWR to approve control area designation (Aiken 1980).

Rights to Saved Water

The second bill would establish rights to saved water and authorize transfers of the saved water (see table 1). Saved water — also called *salvaged water*— refers to water which normally would be consumed or lost in a water use but which is instead saved through an improved use or other water-saving technology. A common example is lining previously unlined irrigation ditches, thus reducing water seepage from the canals. In some states, municipalities have shared the cost of lining irrigation canals in exchange for a share of the saved water. One difficulty is determining how much water has really been saved through the improved practices. Water that might appear to be lost may in fact return to the stream or groundwater basin, where it is used by others.

Under the proposed saved water bill, a surface water appropriator wishing to install a water-saving practice or technology would first file a conservation proposal with the Department of Water Resources, describing how the practice would save water. The DWR might approve the water conservation proposal if it determined the plan was feasible, would conserve water, could be implemented without injuring existing water rights, and was not contrary to the public interest. Once the applicant completed the conservation proposal, the DWR would determine the quantity of water saved. Any water conserved might be used by the applicant to irrigate additional land, reserved for future use, or sold for any purpose, including instream flows.

The proposed bill would provide financial incentives to save water by allowing the appropriator to sell or otherwise use the saved water. The difficulty and controversy would come in determining the actual quantity of water saved. The return flows issue would be just as controversial in Nebraska water rights proceedings as they are in other states.

Water Use Fees

The water use fee bill is the vehicle for providing financing for Nebraska water projects (see table 1). The bill would require payment of water use fees by:

- Groundwater users irrigating more than 160 acres across a section line,
- Other groundwater users transporting more than 250 acre-feet across a section line annually,
- Surface water users diverting more than five cubic feet per second or using more than 1,000 acre-feet annually,
- Owners of groundwater recharge reservoirs recharging more than 1,000 acre-feet per year, and

- Surface water storage reservoir owners storing more than 1,000 acre-feet per year.

The water use fees would vary, depending on the purpose of use. For public water supply systems (municipal and rural domestic water users) the fee would be $5 per acre-foot or $8 per service connection (user's choice). For irrigation use, the charge would be $0.50 per acre foot or $1 per acre irrigated (user's choice). For industrial, commercial, and power uses, the charge would be $1 per acre-foot. The fees collected would be available for water development (reservoir construction) purposes.

The water use fee is likely to be the most controversial feature of the water transfers legislative proposals. The fees would be applied to both instate uses and out-of-state uses. Most irrigation uses would be exempted, but many municipal, rural domestic, and industrial users would be required to pay the fees, as would all water exporters. If the fee were imposed immediately, it would raise approximately $7 million annually. As discussed

The water use fee is likely to be the most controversial feature of the water transfers legislative proposals.

earlier, there is a real question as to whether revenue such as this should be used for increased water development.

Water Right Transfers Clearinghouse

Another proposed bill would require the Water Management Board to maintain a list of prospective buyers and sellers of water rights and to distribute a transfer guide containing information about the transfer process (see table 1). This clearinghouse function would facilitate the water rights transfers or sales process, and would provide buyers and sellers with information regarding how to buy and sell water rights. The bill is simply an additional option to facilitate the water rights transfer process if such transfers are authorized.

State Water Transfer Projects

The last proposed water transfers bill would authorize the Water Management Board to establish its own water projects (see table 1). The projects could be for any purpose, including water export. The board could also participate in water projects sponsored by other entities. Board water

projects would be funded either from legislative appropriations or from water use fees.

Enacting this bill would have little consequence until substantial amounts of money were available for water transfer project development. If, for example, the water use fee were enacted and all or most of the money allocated to water transfer project development, the program would have significant effects on encouraging instate water transfers and water exports. In the absence of such aggressive funding, however, the program would have little significance. The important issue is program funding rather than the details of the water transfers project development program itself.

Additional Policy Alternatives

As indicated earlier, LB 146 was based on the questionable premises that the *Sporhase* decision requires states to treat water exports on the same basis as instate water uses and that water exports represent an attractive financial opportunity for the state of Nebraska. As a result the LB 146 study examined only policy options that would encourage and facilitate exporting water from Nebraska. Alternatives to limit water exports, such as those policies developed by New Mexico, were not considered. A broader range of policy alternatives are available to Nebraskans, more than those considered in the LB 146 water transfers study. Additional policy alternatives include a more limited authorization of water rights transfers, more restrictive groundwater allocation policies, state water appropriation and water marketing, and the

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riskier option of exploring the boundaries of the limited instate preference authorized by the *Sporhase* decision (see table 1 for an overview).

Water Exports and Transfers Policy Alternatives

The major political concern regarding water exports and instate interbasin water transfers is that the areas from which the water is exported will be irreparably harmed. Sandhills residents foresee wet meadows drying up,

streamflows diminishing, wetlands disappearing, and, in the extreme, the Sandhills blowing away. While these fears are exaggerated, there could be significant local groundwater effects extending perhaps several miles from a withdrawal site if significant quantities of Sandhills groundwater were withdrawn. The policy issue is whether the harm is irreparable or whether it can be compensated or mitigated. These are complicated factual determinations that must be made on a case-by-case basis.

The political fact that Sandhills residents may have to accept, unpleasant as it may be, is that if water is needed by a more populous region, the thirsty population will find political ways to quench its thirst. The choice that the water transfer legislative proposals offer residents of water-rich areas is whether that water will be purchased or, instead, obtained through political fiat.

There are many different scales of possible water transfers and exports. Most transfers or exports are likely to be similar to the *Sporhase* transfer itself: Small quantities moved over short distances. Larger quantities imported over longer distances quickly become expensive and will be a last resort among water supply options. For example, the cities of Phoenix, Tucson, Denver, and Los Angeles will find it much less expensive to purchase local irrigation water rights and convert them to municipal use or to develop local water supplies than seeking to import groundwater from Nebraska. In the near future, importing Nebraska groundwater to these regions is simply not cost-effective. While large-scale exports are possible in the future, they are probably at least a generation away. This does not mean that this possibility should be dismissed, but rather that if Nebraska authorizes water transfers and exports it will not immediately result in massive exports of water.

A more likely result is the interbasin transfer of groundwater for irrigation purposes. Several areas of the state, including the central Platte River, Blue River, and Republican River basins, are facing groundwater depletion from irrigation. These regions are competing for Platte River water rights to build surface water irrigation projects to replace some but not all of the groundwater supply being depleted. Whether any of these proposed projects will be successful depends largely on whether the state or federal government is willing to share in paying the project costs. In any event, there is a greater demand for supplemental irrigation water than the Platte River can supply even under the most optimistic assumptions (Aiken 1987). Therefore, irrigators who do not secure a Platte River water project will look to alternative water sources, including Sandhills groundwater. Interbasin groundwater transfers could become the water source for new irrigation projects if state financing for such projects (for example, from a state water use fee) can be generated.

The LB 146 water transfers study proposes to authorize instate and interstate water transfers with strong mitigation and compensation requirements. With this background, several additional policy alternatives appear worthy of consideration.

Do Nothing. One option is to make no substantial policy changes. In this scenario the current surface and groundwater export statutes would be retained without major change. Statutory changes that should be considered, however, include clarifying that groundwater cannot be exported under a municipal or industrial groundwater transfer permit without also obtaining a groundwater export permit.

This policy would provide some protection to Nebraska groundwater uses in that the Department of Water Resources director has broad, if implicit, discretion under current statutes to tip the scales toward instate uses in evaluating proposed water exports. In addition, Nebraska landowners would not have the opportunity to sell the groundwater underlying their land for export. This approach would reduce current political controversy, deferring it to the future.

Discourage Exports. A second option would be to discourage exports by better defining the public interest criterion in surface and groundwater export statutes to include a greater consideration of future instate water needs. This could include the possibility of water transfers and higher water use charges for exports. Basically, this option would explore the boundaries of the limited instate preference of *Sporhase*.

Strictly Allocate Groundwater. Nebraska is one of only a few western states that does not allocate groundwater similarly to surface water. Given approval in the *Sporhase* decision of strict water conservation measures applied across the board, Nebraska could establish strict groundwater allocations to achieve stated aquifer life objectives.

A very modest objective would be to require groundwater supplies to last at least forty years and to restrict withdrawals and well drilling accordingly. This requirement in Colorado forced Mr. Sporhase to come to Nebraska for water to irrigate his Colorado land: that state had already closed his area to further drilling to prevent groundwater depletion in less than forty years. In some areas where supplies were more abundant or groundwater development less widespread, a 100-year minimum useful life might be a more appropriate policy objective. This would be more restrictive, but it would provide a higher degree of resource protection. To accomplish a perpetual useful life — the stated policy of most natural resource districts in Nebraska — would require limiting total withdrawals to average annual recharge. This restrictive approach would be most feasible in an area such as the Sandhills,

where recharge is significant and where irrigation is not as widely developed as in other regions of Nebraska.

The effect of these restrictive policies would be to discourage large-scale groundwater exports. For example, low volume exports to small communities or rural water districts would probably not be affected by strict groundwater allocation policies; large exports to Denver, Phoenix or Los Angeles would. Local groundwater development would also be restricted, which may be one reason this option was not pursued by the Water Management Board in the water transfers study.

Protect Instream Flows. A similar policy could be established for surface water through state water reservations or appropriations for instream purposes in order to maintain existing streamflows and associated environmental values. Such a policy would be favored not only by environmental interests, but also by Platte Valley municipalities depending upon Platte River recharge of municipal wellfields, such as is the case for Omaha, Lincoln, Grand Island and Fremont.

State Water Leasing. One option worthy of more detailed consideration is for Nebraska to appropriate its unappropriated water to the state itself and then make that water available for use on a lease basis rather than by appropriation. A similar policy has been adopted by Montana, ostensibly to insulate the state from the *Sporhase* decision. The basic theory is that if the state is leasing rights to use water rather than allocating water rights, the state has entered the market directly rather than regulating market activity and therefore is not subject to the interstate commerce clause (Tarlock 1988). If the state is a market participant rather than a market regulator, the state may favor its own citizens in, for example, marketing the state's water. This might include charging higher prices for water exports than for instate water uses, even prices making exports prohibitively expensive. The market participation strategy has not yet been legally tested regarding water exports, but it is an option worth further consideration if Nebraska policy makers determine the state is better served by using Nebraska water in Nebraska rather than by selling it for export.

Instate Water Use Preferences. The final water exports strategy is to build on the implied *Sporhase* instate preference. The *Sporhase* decision suggests that in states where water is publicly owned, public ownership may justify favoring instate use over water exports beyond public health considerations. Unfortunately, the U.S. Supreme Court did not explain what it meant when it said this. Ultimate resolution of this issue will require additional litigation of state water export policies, similar to that of *El Paso I* and *II*, including further litigation in the U.S. Supreme Court. What this

instate preference suggests, however, is that states may be free to pursue alternatives to favor instate use over water exports, and that this can be done through vehicles other than the Nebraska reciprocity clause.

How might an instate preference be advanced? The easiest way is to require positive net benefits to Nebraska from all proposed water appropriations, including water exports. If a proposed export would interfere with existing water uses, harm environmental values, and provide economic benefits only outside Nebraska, the project would have no benefits to Nebraska and the state might be justified (under the implied *Sporhase* instate preference) in denying the application. The appropriation criteria could be refined to require net benefits in every evaluation category; that is, positive net water supply benefits to Nebraska, positive net economic benefits to Nebraska, and positive net environmental benefits to Nebraska from any proposed appropriation (including exports). If exporters must score positively on every evaluation criterion, the cost of water exports would be increased substantially: new wells would have to be drilled or well owners compensated for lowered groundwater tables; streamflow would need to be augmented to compensate for stream-depletion effects of groundwater pumping; and local governments would need to be compensated for reduced property tax receipts if groundwater declines lowered land values.

The basic policy issue is whether water exports are good or bad for Nebraska. LB 146 uncritically concludes that exports are good and should be vigorously pursued. The public response to LB 146 suggests that Nebraskans

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do not share that judgment. If the *Sporhase* decision means that water exports are inevitable, then Nebraska should take some steps to protect its legitimate interests. This may include a policy of encouraging water exports for the economic benefits of Nebraskans with water to sell. At this point, however, it seems premature to conclude that the state's interest is best served by aggressively trying to export Nebraska water for sale, the original intent of LB 146 and LB 151.

Water Right Transfers Policy Alternatives

The specter of selling water rights raises many of the same fears as selling or exporting water. Images come to mind of irrigated land reverting to

dryland, rural communities dying, and the state turning to dust. Again, these fears are significantly exaggerated. As irrigation consumes approximately ninety percent of all water used in the West (and in Nebraska), all nonirrigation uses could be doubled by reducing irrigation only ten percent. Even if municipal and industrial water uses expand dramatically, they are not likely to double for many years. Thus, making water rights salable will not lead to the end of irrigated agriculture in Nebraska.

The LB 146 water transfers study recommends making water rights freely transferable between uses and across river basin and state lines, subject to a showing of no injury to existing water rights holders. This would create an opportunity for some imaginative water management opportunities in Nebraska. For example, if the Two Forks project to impound additional Platte River water in Colorado would reduce streamflow into Nebraska, harming wildlife species, the Two Forks sponsors could avoid that harm by purchasing Nebraska surface water rights and converting those rights to instream uses. Similarly, if the Wyoming Deer Creek project would reduce water availability to downstream Nebraska irrigators, Deer Creek sponsors could purchase Nebraska water rights and either retire them or make them available to Nebraska irrigators. Upstream development could still occur, and Nebraska water uses would be compensated either with money or with water. Wildlife proponents within Nebraska could also buy out existing irrigators and convert their rights to instream uses. Making water rights salable would add considerable flexibility to Nebraska water management options.

Against this background, additional policy alternatives include doing nothing and making water rights transferable, but only for environmental enhancement and water resource mitigation.

Do Nothing. A possible alternative is to do nothing — to leave existing water rights transfer policies intact. This would deprive Nebraska of the flexibility afforded by water right transfers, but would largely insulate the state from exporting water rights. If water rights could not be sold for use outside the river basin or for a different use, there would be virtually no economic reason to purchase water rights from within or outside of Nebraska.

Environmental Enhancement and Mitigation Transfers. An intermediate policy would be to allow water rights to be changed to different uses only when the purpose was to improve minimum streamflows or to mitigate the harm to irrigators of an upstream water project. That is, irrigation water rights could not be sold for municipal or industrial uses but could be sold for environmental enhancement or mitigation. Thus, surface water rights could be purchased and the water left in the stream either to compensate for the

stream depletion effects of an upstream water project, or simply to improve wildlife habitat. This option would allow Nebraska to capture some of the flexibility afforded by water rights transfers without completely opening up the possibility of interstate water rights transfers for municipal or industrial purposes.

Conclusion

Water transfer is a difficult, complicated, and controversial topic. Unfortunately, the *Sporhase* decision will not allow Nebraska policymakers the luxury of avoiding the issues involved. Policymakers must understand the interrelationship of water transfer and its various policy strands with other water policy issues, such as groundwater depletion, instream flows, financing water development, and the relationship between water development and crop surpluses. The Water Management Board's water transfer study and proposed bills provide significant issues for political consideration. This chapter provides a broader perspective of how these issues relate to larger water and natural resource policy concerns.

Endnote

1. An acre-foot of water is enough water to cover an acre of land to a depth of one foot, or 325,851 gallons. An acre-foot of water will irrigate approximately one half acre of corn or will supply the domestic needs of a family of four for approximately one year.

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